Supreme Court, U. S.
FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-2008

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

SANTE FE LAND IMPROVEMENT COMPANY,
a California corporation,
Petitioner,

vs.

CITY OF BERKELEY, a political subdivision of the State of California, and the STATE OF CALIFORNIA, acting by and through the STATE LANDS COMMISSION,
Respondents.

REPLY MEMORANDUM FOR THE PETITIONER

EDGAR B. WASHBURN
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
(415) 981-2121
Counsel for Santa Fe Land Improvement Company, Petitioners

Of Counsel:
WASHBURN, KEMP & WAGENSEIL
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
(415) 981-2121

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7852

TABLE OF CONTENTS

		Page
1.	Petitioner raised the questions presented at each level of the proceedings below	2
2.	The decision below decided the federal common law question presented which is reviewable by this court under 28 U.S.C. § 1257(3)	4
3.	The decision of the California Supreme Court must be reviewed at this time notwithstanding possible further proceedings in the trial court	7

TABLE OF AUTHORITIES CITED

Cases

	Page
Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973)	6
City of Berkeley v. Superior Court, 26 Cal.3d 515 (1980)	6, 7
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	9
Detroit & M.R. Co. v. Michigan R. Com., 240 U.S. 564 (1916)	8
Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892)	2, 4, 5, 6,7
Knudson v. Kearney, 171 Cal. 250 (1915)	3, 4, 7
New York ex rel. v. Zimmerman, 278 U.S. 63 (1928)	8
Rio Grande Western R. C. v. Stringham, 239 U.S. 44 (1915)	10
State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977)	5, 6
Tally v. Ganahl, 151 Cal. 418 (1907)	10

Constitution

U.S. Const., amnd. V	2
U.S. Const., amnd. XIV	2, 3, 4

Statutes—Federal

28 U.S.C. § 1257	4, 6, 7, 8

No. 79-2008

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

SANTA FE LAND IMPROVEMENT COMPANY,
a California corporation,
Petitioner,

VS.

CITY OF BERKELEY, a political subdivision of the State of California, and the STATE OF CALIFORNIA, acting by and through the STATE LANDS COMMISSION,
Respondents.

REPLY MEMORANDUM FOR THE PETITIONER

Respondents City of Berkeley and State of California have predicated their opposition to the substantive issues raised by the petition for certiorari filed by petitioner Santa Fe exclusively upon procedural grounds. They maintain that Santa Fe did not timely raise the two federal questions below; that there were potential alternative state grounds for the California Supreme Court's decision on the federal common law question; and that the pendency of further proceedings in the trial court may render the federal questions moot. The purpose of this reply is to point out that each of the foregoing assertions is incorrect.

1. Petitioner Raised the Questions Presented at Each Level of the Proceedings Below

Santa Fe initially raised the two questions presented by the petition in its amended complaint filed on February 5, 1976, and in its answer to the state's cross-complaint filed on May 14, 1976. By those pleadings, it asserted that the State of California possessed the power to convey the property at issue into absolute private ownership free of the public trust for commerce, navigation and fishing. (Amended Complaint at 3.) It also alleged that by seeking to impress the subject lands with the public trust for commerce, navigation and fishing, the city and state sought to take Santa Fe's property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. (Amended Complaint at 8-10.)[1]

Following Santa Fe's successful motion for summary judgment in the trial court, the city and state filed a petition for writ of mandamus in the court of appeals seeking to set aside the trial court's order. In its "Answer to Petition for Writ of Mandamus and Memorandum of Points and Authorities in Support Thereof," filed January 25, 1978 [hereafter referred to as "Answer to Writ"], Santa Fe again raised the two questions presented. In particular, Santa Fe contended that the State of California had the absolute power to convey the lands at issue into private ownership and that the principles set forth in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S.

---

[1]The constitutional questions were also raised by the seventh and ninth affirmative defenses in Santa Fe's answer to the cross-complaint of the State.

387 (1892), were not applicable in that state law not federal law governed.[2] Similarly, Santa Fe raised the argument that reversal of *Knudson v. Kearney,* 171 Cal. 250 (1915), would effect a taking of its property in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.[3]

---

[2]Santa Fe asserted that:

> "The power of the State to control, regulate and utilize its navigable waterways and the lands lying beneath them, is absolute, except as limited by the supervisory power of the federal government over navigable waters. *Coldberg, Inc. v. State of California ex rel. Dept. of Public Works,* (1967) 67 Cal.2d 408, 416. The State's power includes the right to irrevocably dispose of any portion of said lands and to terminate the public trust. (citations omitted)." (Answer to Writ at 9-10)

. . .

Santa Fe further argued that:

> "Petitioners rely upon the decision of the United States Supreme Court in *Illinois Central R. Co. v. State of Illinois,* (1892) 146 U.S. 387, for the proposition that the subject conveyances were invalid because their alleged effect was to substantially impair the public's interest in, and governmental control over, tide and submerged lands. At the outset it should be noted that state law, not federal law is applicable herein. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel* (1977) 97 S.Ct. 582; *Shively v. Bowlby* (1894) 152 U.S. 1. Hence, any inference that the *Illinois Central* case enunciates some overriding federal principles that are applicable here is incorrect. . . ." (Answer to Writ at 32.)

[3]Santa Fe argued:

> "The State's attempt to subvert the law as set forth in the *Kundson* and *Alameda Conservation Association* cases by depriving Santa Fe and Murphy of title to the land in question, clearly impairs the obligation of contracts (United States Constitution, Article I, Section 10). It would further deprive them of their property in violation of the due process clause of the

In its petition for a hearing before the California Supreme Court filed on August 8, 1978, Santa Fe once again raised the questions presented in this proceeding. Santa Fe asserted that the State of California through its legislature had the power to "dispose absolutely of lands beneath navigable waters" (Petition for Hearing at 14 and 21) and that for the state supreme court to reverse *Knudson v. Kearney* would be to deprive Santa Fe of its property without due process in violation of the Fourteenth Amendment of the United States Constitution. (Petition for Hearing at 22-23.) Again, the same arguments were made in Santa Fe's petition for rehearing following the decision of the California Supreme Court below.

2. The Decision Below Decided the Federal Common Law Question Presented Which Is Reviewable by This Court Under 28 U.S.C. § 1257(3)

Respondents do not claim that the question presented as to the taking of Santa Fe's property without due process, in violation of the Fourteeenth Amendment to the United States Constitution, does not constitute a federal question. However, respondents do contend that the California Supreme Court's reliance upon the restrictions expressed in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892) as the basis for its decision does not give rise to a federal question. The arguments advanced by respondents in support of this contention are without merit.

As more fully set forth in the petition, the California Supreme Court construed this Court's decision in *Illinois*

Fourteenth Amendment of the United States Constitution. *Appleby v. City of New York,* (1926) 271 U.S. 364, 381, 397-402. . . ." (Answer to Writ at 47.)

Central, supra, as imposing restrictions upon California's ability to convey tidelands into private ownership. In so holding, the state supreme court necessarily concluded that the doctrine announced in *Illinois Central* represents a federal common law limitation upon the otherwise unfettered authority of states to develop their own rules governing lands underlying navigable waters. To the extent that conclusion directly conflicts with this Court's decision in *State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977) and the Equal Footing Doctrine, the existence of a federal question is self-evident.

Respondents argue that the California Supreme Court's failure to use terms such as "bound" or "binding" in its reference to *Illinois Central* indicates that it did not rely upon that decision as the basis for its decision and, therefore, the decision is not based upon the state court's construction of federal law. However, a brief review of the decision below demonstrates that the court's reliance on the doctrine announced in *Illinois Central* could not be more explicit:

> "There were limitations imposed by this ancient doctrine [the public trust] upon the alienation of tidelands to private parties. *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387 (36 L.Ed. 1018, 13 S.Ct. 110) was the seminal case on the scope of the public trust doctrine and remains the primary authority even today, almost nine decades after it was decided. *The decision established the principle that a state, as administrator of the trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties.*" (Emphasis

added.) *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521 (1980) (emphasis added).

Respondents advance two additional alternative contentions which assume the existence of a federal question. First, respondents claim that the issue raised by the California Supreme Court's implementation of the *Illinois Central* doctrine does not come within this Court's certiorari jurisdiction as set forth in 28 U.S.C. § 1257(3) because it does not involve any title, right, privilege or immunity set up or claimed under the Constitution, treaties or statutes of the United States. Respondents miss the point. The question is whether, by concluding that there is an overriding federal principle restricting the ability of the state to convey tidelands into private ownership, the California Supreme Court erroneously limited the right of the state to develop its own rules of property governing lands received by reason of its sovereignty. This right arose by reason of the Equal Footing Doctrine and is a question clearly reviewable by certiorari, pursuant to 28 U.S.C. 1257(3), as being a right arising under the Constitution of the United States. *State Land Board v. Corvallis Sand & Gravel Co., supra; Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

Finally, respondents urge that there are adequate nonfederal grounds for the decision below and, therefore, the California Supreme Court's reliance on *Illinois Central* is irrelevant to the court's decision. In particular, respondents argue that "the first and principal ground for the supreme court's decision was its determination that the 1870 California legislature had not intended to terminate

the tidelands trust over the lands authorized to be sold." [Respondent's Brief in Opposition, filed July 18, 1980, at 15.] Respondents' contention that the state court relied upon its construction of the legislative intent in enacting the 1870 legislation as an independent basis for the decision below is flatly contradicted by the language of the decision itself:

> "*Knudson* was incorrectly decided even if the court had been justified in concluding that the purpose of the 1870 Act was to promote navigation. *Illinois Central* holds that a state may not grant to private persons tidelands as vast in area as the board was authorized to sell by the 1870 Act."
>
> *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 531 (1980).

It is clear that the decision of the California Supreme Court was based upon its belief that *Illinois Central* limits the power of the state to develop its own rules of property authorizing conveyance of tidelands into private ownership. Its conclusion that *Knudson v. Kearney*, 171 Cal. 250 (1915), did not comport with the federal restrictions imposed upon California by *Illinois Central* led it to overrule its prior decision. Thus, the court determined a federal question reviewable by this Court pursuant to 28 U.S.C. 1257(3).

3. The Decision of the California Supreme Court Must Be Reviewed at This Time Notwithstanding Possible Further Proceedings in the Trial Court

Respondents argue that the possible pendency of further proceedings in the trial court renders assumption of

jurisdiction by this Court premature. Their contention is premised upon the fact that Santa Fe has raised the questions of whether or not the state and city are estopped to assert that Santa Fe does not own its lands in fee simple and that Santa Fe has made a claim for inverse condemnation based upon the City of Berkeley's utilization of restrictive zoning to deny Santa Fe any reasonable use of its property.[4]

Respondents do not contend, nor can they, that the decision of the California Supreme Court is not final for purposes of review under 28 U.S.C. § 1257. As noted by Santa Fe in its petition for a writ of certiorari [filed June 19, 1980, at 2, n. 1] the decision below arose from an extraordinary writ proceeding separate and distinct from the underlying trial court action. The decision of the court below is final as to the issues resolved by the writ proceeding and there are no further matters to be considered by the trial court in that regard. This Court has repeatedly held that a decision by the highest state court on an extraordinary writ is a final judgment within the meaning of 28 U.S.C. § 1257 and properly the subject of certiorari review. *Detroit & M.R. Co. v. Michigan R. Com.*, 240 U.S. 564 (1916); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928).

Even if the mandate proceeding out of which the California Supreme Court decision arose was not separate and

---

[4]The inverse condemnation claim arises not by reason of the decision of the California Supreme Court, but rather, by reason of the City of Berkeley's refusal to zone Santa Fe's property for any use. That claim has nothing to do with the decision of the court below.

final for all purposes, the decision below is clearly reviewable at the present time under the standards established by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox* this Court held that it will exercise jurisdiction over cases in which subsequent review of an adjudicated federal claim may be impossible after final disposition of the proceedings still to be conducted in the state trial court. This Court in *Cox* described such a situation:

> "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. *Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.* The Court has taken jurisdiction in these circumstances prior to completion of the case in the state courts." (Emphasis added.)
>
> *Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 481.

This is the identical situation confronting Santa Fe in this proceeding. As respondents point out, if Santa Fe were to prevail in the trial court on the issue of estoppel the federal claims would be moot. Conversely, if Santa Fe were to lose on the merits, California state law would prohibit subsequent review of the federal questions presented since the ruling of the California Supreme Court would become the "law of the case" and would be binding

upon all future trial and appellate proceedings. *Tally v. Ganahl,* 151 Ct. 418 (1907). As a result, Santa Fe would be prohibited from again presenting its federal claims to the California Supreme Court for review following the trial court's final judgment. This Court has held that a subsequent refusal by a state appellate court to review a federal issue on the ground that its earlier decision became the law of the case constitutes an independent state ground precluding this Court's assumption of jurisdiction over the federal questions originally presented. *Rio Grande Western R. Co. v. Stringham,* 239 U.S. 44 (1915).

Review by this Court of the decision below at this time, rather than being premature, is required. If Santa Fe were to await conclusion of the remaining trial court proceedings, it would most likely be barred from seeking review of the federal questions presented by its petition here. The further proceedings to be conducted in the trial court are wholly unrelated to the federal questions presented and the trial court's resolution of the remaining issues can have no effect upon the federal questions already decided by the California Supreme Court.

Respectfully submitted,

EDGAR B. WASHBURN
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
Counsel for Petitioner Santa Fe Land Improvement Company

Of Counsel:
WASHBURN, KEMP & WAGENSEIL
One Embarcadero Center
Suite 2407
San Francisco, CA 94111

July 28, 1980